IN THE

Supreme Court of the United States

October Term, 1941

No. 139

CHARLES M. THOMSON, Trustee for Property of Chicago & Northwestern Railway Company; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

vs.

BARNEY E. GASKILL, Et Al.,

Respondents.

REPLY BRIEF OF PETITIONERS ON CERTIORARI

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Law Briefs—OMAHA LINO-SEUG CO.—418 So. 15th St.

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Respondents in their brief epitomize their contention at the bottom of page 38 as follows: "It is our contention that the allegations in the plaintiffs' petition as to mileage and percentage controls, and the defendants have no right in this preliminary hearing as to jurisdiction to claim that we were only entitled to 7½ miles."

This pronouncement is contrary to respondents' own legal Proposition II, on page 18 of their brief, citing numerous cases from this Court. Perhaps the case which more nearly corresponds to this case is *Kvos v. Associated*

Press, 299 U. S. 269, 81 L. Ed. 183. The language is quoted on page 34 of petitioners' brief. Thus, notwithstanding the above quoted statement from respondents' brief, their citations and ours are the same, and agree that the pleadings are not conclusive, but that proof in the record by affidavits, as in the *Kvos* case and here, may be resorted to in a test of jurisdictional amount.

We have no doubt that the case last cited, and *Clark v. Gray*, 306 U. S. 583, 83 L. Ed. 1001; *Gibbs v. Buck*, 307 U. S. 66, 83 L. Ed. 1111; and *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11, settle the law as to jurisdiction in class actions, as well as the method of challenging jurisdiction in such cases.

The claims of respondents as argued in their brief amount to this:

1. That these 41 respondents constitute a class or the class of persons who would be affected if the relief which they demand is granted. The truth is that there are numerous conductors employed on the C. & N. W. Nebraska Division who have greater seniority rights than any of the respondents, yet they are not made parties, nor do these 41 respondents claim to be acting on behalf of all men on the Division. They merely allege that these respondents "belong to what is known as the Nebraska Division of Trainmen in the employ of the Chicago and North Western Railway Company and its Trustee" (Par. 7, Pet. R. 3).

2. These respondents claim that the railroad line from Omaha to Blair is a part of the C. & N. W. Railway, and of the Nebraska Division of that Company. The affidavits on file show this is not true, but that this track-

age belongs to the C. St. P. M. & O. Railway, a separately operated and managed road. The affidavits also show that these respondents, as employees of the C. & N. W., have no seniority rights whatever on that stretch of track because it is not C. & N. W. track but C. St. P. M. & O. track (R. 38-40). Nevertheless, the respondents in their argument insist on counting the mileage of that track in calculating the jurisdictional amount.

3. The respondents allege that their seniority rights on the C. & N. W. Nebraska Division result from collective bargaining agreements known as schedules. This is correct. But the railroad does not agree that the track from Omaha to Blair is any part of the C. & N. W. Nebraska Division. It has proved that it is not.

4. Respondents claim that their seniority rights under the collective bargaining agreements applicable on the C. & N. W. and as a part of the schedules under which they work (R. 2), have been interfered with by a separate and distinct agreement entered into in 1930 between the Management of the C. & N. W. and the Unions, as to certain runs between Omaha and Sioux City primarily carrying C. St. P. M. & O. freight. The affidavits in the record, page 47, show these to be inter-railroad runs, and not inter-division runs. It is equally proved that seniority rights do not apply to inter-railroad runs (R. 38).

Finally, respondents make the point, as shown in Proposition IV of their points, page 19, and at pages 60-61 of their brief, that respondents' action is a spurious class action, then seek to convert that into a true class action by arguing that respondents' several rights are so interwoven that they cannot be determined without the

presence of all of them in the suit. That argument has been answered by this Court in *Clark v. Gray,* supra. Right of joinder does not confer jurisdiction. Lacking the individual jurisdictional amount involved, the Federal Court has no jurisdiction of a spurious class action, regardless of the common question of law or fact.

Respondents' claims, therefore, in the brief, that this is a class action over which the Federal Court has jurisdiction is based upon the following false assumptions:

(a) That the respondents represent all of the men on the C. & N. W. Nebraska Division. They do not, and do not pretend to so represent them in the petition.

(b) That the track from Omaha to Blair is C. & N. W. track and a part of the C. & N. W. Nebraska Division. That is shown to be false (R. 39-40).

(c) That the separate agreement made between the Managements of the two railroads and the Unions (R. 40-41) infringed seniority rights of the respondents over the trackage between Blair and Omaha. That cannot be true because neither the respondents nor any other C. & N. W. employees have any seniority rights on that trackage (R. 38), nor over any part of the inter-railroad run involved (R. 39-40).

The ultimate effect of respondents' success in this case would be to destroy the rights of the C. St. P. M. & O. railroad men to operate trains carrying traffc of that company between Omaha and Sioux City via Blair and California Junction, and to force a division of those runs between employees of the C. & N. W. exclusively, giving

part of it to the C. & N. W. Nebraska Division men and the balance to the C. & N. W. Sioux City Division men on a mileage basis. Thus the respondents in reality seek to destroy completely the rights of the C. St. P. M. & O. men without even joining them as parties to the suit. The rights of the C. St. P. M. & O. Railway itself are necessarily involved in such a controversy, because if respondents are successful, that railroad cannot handle any part of its traffic between Omaha and Sioux City with its own train crews, but must turn it over to C. & N. W. train crews. Such a destruction of the C. St. P. M. & O. Company's rights cannot be tolerated without giving that Company a chance to defend its rights by being a party to the suit.

A further result of the litigation would be to adjudicate the rights of the men on the C. & N. W. Sioux City Division to run over the C. St. P. M. & O. line from Blair to Omaha and return under the inter-railroad agreement, which is challenged by the device of making only one member of that division a party to the suit, and saying that he may, if he wants to, represent his class. Such a device in disposing of the rights of an entire class is contrary to all the cases, as shown by *Hansberry v. Lee,* supra, that in order to bind the individuals of a class a sufficient number must be joined as parties to insure that the rights of all of the class will be protected. To join only one of a large number of persons in a class does not comply with that rule. Respondents resent the fact that the Unions have come into the case. Apparently they did not intend that the C. & N. W. Sioux City Division men as a class be actually represented at all.

Yet the presence of the Unions in the suit has a threefold purpose as shown by the motions and affidavits filed by the Unions. First, to show that respondents do not in fact represent all of the men on the C. & N. W. Nebraska Division. The Unions do represent all of them by virtue of their position as bargaining agent for all of them, and they have taken a position adverse to the contentions of these respondents. Second, the Unions do represent all of the men of the C. & N. W. Sioux City Division by virtue of the fact that they are the bargaining agents for those men, and again they take a position adverse to these respondents. Third, the Unions seek to uphold the integrity of their agreement with the Managements of both companies, dividing the disputed work between the employees of the C. St. P. M. & O. and the employees of the C. & N. W. Sioux City Division.

These are all legitimate positions for the Unions to assume. Their attitude shows that these respondents do not in fact represent either the men of the C. & N. W. Nebraska Division as a class, nor the men of the C. & N. W. Sioux City Division as a class, but in fact represent only themselves, and that their contentions are adverse to both classes. This demonstrates that respondents' claims are individual and cannot be aggregated for jurisdictional purposes.

We respectfully submit that the Circuit Court of Appeals erred in assuming that the seniority rights of respondents on their own Division, which is definitely an individual right, relative among themselves, can be the basis for the respondents to attempt to coerce the two railroads and the Unions to assign to respondents a portion of these inter-railroad runs, and that this right is a

collective right which warrants the accumulation of the amounts involved.

Respectfully submitted,

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